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In The

Supreme Court of the United States

October Term, 1991

R.A.V.,

Petitioner,

v.

ST. PAUL, MINNESOTA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Minnesota

BRIEF OF THE STATES OF MINNESOTA, ALABAMA, ARIZONA, CONNECTICUT, IDAHO, ILLINOIS, KANSAS, MARYLAND, MASSACHUSETTS, MICHIGAN, NEW JERSEY, OHIO, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, VIRGINIA AND UTAH AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

Statement of Interest 1

Summary of Argument 2

Argument 4

I. States Have a Compelling Interest in Prohibiting Bias-Motivated Activity That Is Directed at and Harmful to Individual Citizens..... 4

II. There Is a Range of Bias-Motivated Activity That May Be Prohibited Without Infringing First Amendment Rights 13

III. As Narrowly Construed by the Minnesota Supreme Court, the Saint Paul Ordinance Is Valid..... 20

Conclusion 30

TABLE OF AUTHORITIES

Page

CONSTITUTIONAL PROVISIONS

U.S. Const., amend. 1 ..... *passim*

U.S. Const., amend. 13 5

U.S. Const., amend. 14 5

Ariz. Const. §§ 12 and 13 5

STATUTES

18 U.S.C. § 241 (1988) 16, 19

18 U.S.C. § 242 (1988) 5

42 U.S.C. § 1981 (1988) 5

42 U.S.C. § 1982 (1988) 5

42 U.S.C. § 1985(3) (1988) 5

42 U.S.C. § 2000a *et seq.* (1988) 5

42 U.S.C. § 2000c *et seq.* (1988) 5

42 U.S.C. § 2000e *et seq.* (1988) 5

Cal. Penal Code §§ 422.6-422.9 (West 1988) 5, 15

Fla. Stat. §§ 876.17-.18 (1989) 17

Ga. Code Ann. § 16-7-26 (Michie 1988) 17

Hate Crime Statistics Act, Pub. L. 101-275, 104 Stat. 140 (1990) 7

Ill. Ann. Stat. § 12-7.1 (Smith-Hurd Supp. 1991) 15

Minn. Stat. ch. 363 (1990) 5

Minn. Stat. § 609.72, subd. 1(3) (1990) 26

TABLE OF AUTHORITIES – Continued

Page

Ohio Rev. Code Ann. § 2927.12 (Anderson 1987) 15

R.I. Gen. Laws § 11-42-3 (Supp. 1990) 14

Va. Code Ann. § 18.2-423 (1988) 17

CASES

Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) 26

Barnes v. Glen Theatre, Inc., 111 S.Ct. 2456 (1991) 18, 20

Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569 (1987) 22

Bob Jones University v. United States, 461 U.S. 574 (1983) 6

Brandenberg v. Ohio, 395 U.S. 444 (1969) 4, 21, 23, 24

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 21

Brown v. Board of Education, 347 U.S. 483 (1954) 6

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) *passim*

City of Houston v. Hill, 482 U.S. 451 (1987) 22, 25

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 20

Cohen v. California, 403 U.S. 15 (1971) 25

Colten v. Kentucky, 407 U.S. 104 (1972) 19

Cox v. Louisiana, 379 U.S. 559 (1965) 26

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 26

TABLE OF AUTHORITIES – Continued

Page

Gooding v. Wilson, 405 U.S. 518 (1972) 22, 28

Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1981) 29

Hustler Magazine v. Falwell, 485 U.S. 46 (1988) 19, 25

In the Matter of the Welfare of R.A.V., 464 N.W.2d 507 (Minn. 1991) 21, 23, 24

Kucharek v. Hanaway, 902 F.2d 513 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 713 (1991) 27

Lewis v. City of New Orleans, 415 U.S. 130 (1974) 25, 28, 29

Miller v. California, 413 U.S. 15 (1973) 24

Osborne v. Ohio, 110 S.Ct. 1691 (1990) 21

Papish v. Board of Curators of the University of Missouri, 410 U.S. 667 (1973) 26

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 6

United States v. Salyer, 893 F.2d 113 (6th Cir. 1989) 15

United States v. Lee, 935 F.2d 952 (8th Cir. 1991) .. 16, 19

United States v. O'Brien, 391 U.S. 367 (1968) ... 3, 14, 18

Ward v. Illinois, 431 U.S. 767 (1977) 24

Watts v. United States, 394 U.S. 705 (1969) 3, 14, 18

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

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P. Finn, *Bias Crime: Difficult to Define, Difficult to Prosecute*, 3 Crim. Just. 19 (1988) 12

Governor's Task Force on Bias-Related Violence, State of New York, Final Report (1988) 7

Hate Crime Statistics Act of 1988: Hearing on S. 702, S. 797, and S. 2000 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 100th Cong., 2d Sess. 240 (June 21, 1988) 12

V. Lane, *Bias Motivated Crimes, A Summary Report of Minnesota's Response* (1990) 9

V. Lee, *Legislative Responses To Hate-Motivated Violence: The Massachusetts Experience and Beyond*, 25 Harv. C.R.-C.L. L. Rev. 287 (1990) 7, 16

C. Lutz, *They Don't All Wear Sheets, A Chronology of Racist and Far Right Violence – 1980-1986* (1987) 8

M. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989) 11

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TABLE OF AUTHORITIES – Continued

Page

M. & J. Newton, *Racial & Religious Violence In America: A Chronology* (1991) 7

H. Shapiro, *White Violence and Black Response* (1988) 7

U.S. Commission on Civil Rights, *Intimidation and Violence, Racial and Religious Bigotry in America* (Clearinghouse Publication No. 96, 1990) 8, 9, 13

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STATEMENT OF INTEREST

The amici curiae states, through their attorneys general, respectfully submit this brief in support of Respondent City of St. Paul. They support affirmance of the decision of the Minnesota Supreme Court narrowly construing the ordinance of the City of St. Paul at issue and holding it constitutional as construed.

This case involves the confluence of several significant, and sometimes competing, societal values: the fundamental principle that all citizens of this nation have an equal right to life, liberty, and the pursuit of happiness without regard to race, religion, national origin, sex or other invidiously discriminatory distinction; the equally basic premise that freedom of speech preserves and strengthens our democratic society; and the elementary tenet that preservation of peace and order are necessary to the maintenance of the social fabric. The amici states have both an interest in and responsibility to foster the accomplishment and protection of each of these values. Part of that interest and responsibility lies in seeking to reach the proper balance among these interests when they conflict. This brief is submitted with the hope that it will assist the Court in identifying that appropriate balance in this case.

SUMMARY OF ARGUMENT

As a nation we are dedicated to equality of opportunity for all and eradication of invidious discrimination. Our commitment to equal treatment is reflected in our constitutions and laws (federal and state), as well as in our judicial decisions. Nevertheless, bias-motivated violence, such as the cross-burning at issue here, remains a significant problem. Indeed, a substantial increase in the number of incidents of bias-motivated crime has been reported in recent years.

State and local governments have a strong interest in putting a stop to bias-motivated violence that transcends their general interest in maintaining peace and order. Bias-motivated violence has significantly more harmful impacts than similar criminal conduct not similarly motivated. The

effects on the victims can be particularly denigrating and threatening. Effects on the community can also be serious, ranging from alienation to increased tension to additional violence. The amplified harm caused by bias-motivated violence gives states compelling reasons to adopt measures directed at its elimination. Such measures are important as well for the message that they convey to both the victims and perpetrators of bias-motivated violence that such conduct is unacceptable in our society.

States have adopted a variety of measures to address the problem of bias-motivated violence. Some laws prohibit threatening speech. Others enhance penalties for criminal activity that is bias-motivated. Others criminalize conduct that interferes with the exercise of civil rights, while others penalize bias-motivated property damage and vandalism. No less that forty-three states have laws that specifically address some form of bias-motivated violence.

The states have not lost sight of the first amendment in enacting these laws. There is a range of bias-motivated conduct that is prohibited by the states without infringing any first amendment rights. None of the states' laws ban ideas; none prohibit a speech to a rally advocating bigotry. To the extent that the state laws reach pure speech, they tend to address only genuine threats, which are not protected under the first amendment. *Watts v. United States*, 394 U.S. 705 (1969). To the extent these laws reach conduct with some expressive element, they are subject to the standard of *United States v. O'Brien*, 391 U.S. 367 (1968), and satisfy its requirements. They are aimed not at any expressive content of the violent conduct, but at the harmful effects of that conduct. Bigots have ample alternative avenues for expression of their beliefs. They are only prohibited from expressing them in a

manner intended to do harm to person or property or to interfere with the enjoyment of civil rights.

The St. Paul ordinance challenged here should be reviewed as limited by the Minnesota Supreme Court. The state court construed the ordinance to apply only to two forms of expressive conduct, fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), and intentional incitement of imminent lawless action, *Brandenberg v. Ohio*, 395 U.S. 444 (1969). Because these two categories have previously been held by this Court to be undeserving of first amendment protection, the ordinance cannot be substantially overbroad. Thus, petitioner can challenge the ordinance only as applied to his alleged conduct, burning a cross on the property of an African-American family. As applied to petitioner's alleged conduct, the ordinance is neither overbroad nor unconstitutionally vague.

ARGUMENT

I. STATES HAVE A COMPELLING INTEREST IN PROHIBITING BIAS-MOTIVATED ACTIVITY THAT IS DIRECTED AT AND HARMFUL TO INDIVIDUAL CITIZENS.

As the United States embarks on its third century, it should be beyond cavil that we are a nation committed to equality and tolerance. One of the bedrock principles of our democracy is that every individual should have an equal opportunity in our society regardless of race, religion, national original or sex. Indeed the quest for religious tolerance was part of the founding heritage of the country. Sadly, our commitment to racial equality came

later and at great cost to those who have suffered the legacy of slavery and *de jure* segregation. Nevertheless, our commitment to racial equality is no less fundamental or important for our more recent dedication to it.

This national commitment to elimination of invidious discrimination is not just empty ideals and rhetorical goals. Rather, it is firmly rooted in our constitutions and laws. The first amendment to the United States Constitution guarantees religious liberty. The thirteenth amendment requires the elimination of all badges of slavery. The fourteenth amendment guarantees to each citizen the equal protection of the laws. State constitutions echo these federal provisions. *E.g.*, Ariz. Const. §§ 12 (religious freedom) and 13 (equal protection).

Legislation evidences and enforces the commitment to equal opportunity and treatment. Federal law makes criminal conduct that attempts to deprive individuals of their rights based on race, 18 U.S.C. § 242 (1988), and creates civil remedies for discriminatory conduct. *E.g.*, 42 U.S.C. §§ 1981, 1982, and 1985(3) (1988). The right to equal opportunity and fair treatment in public accommodations, public education and employment, among other areas, is specifically protected by federal statute. 42 U.S.C. §§ 2000a *et seq.*, 2000c *et seq.*, 2000e *et seq.* (1988). This commitment and the legislative efforts to achieve and enforce it are mirrored at the state level. *E.g.*, Minn. Stat. ch. 363 (1990) (prohibiting discrimination based on race, religion, national origin, etc., in employment, housing, public accommodations); Cal. Penal Code §§ 422.6-422.9 (West 1988).

The decisions of this Court further confirm the commitment. In the area of education, the Court has repeatedly enunciated the nations's commitment to eradication of racial discrimination.

> [T]here can no longer be any doubt that racial discrimination in education violates deeply held and widely accepted views of elementary justice. . . . This Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), signalled an end to that era [of racial segregation]. Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest to a firm national policy to prohibit racial segregation and discrimination in public education.

Bob Jones University v. United States, 461 U.S. 574, 592-93 (1983). Similarly, in addressing a challenge to the Minnesota Human Rights Act, the Court explained:

> [T]he Act reflects the State's historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services. [Citation omitted.] That goal, which is unrelated to the suppression of expression, plainly serves a compelling state interest of the highest order.

Roberts v. United States Jaycees, 468 U.S. 609, 624 (1984).

Much of the legislative approach to combatting discrimination has been directed at specific areas, such as education, housing, employment, and public accommodations. Since the issues that have reached this Court have usually been driven by the legislation, the Court's decisions have also been in the context of those areas.

However, in recent years, another facet of the ugly face of racism and discrimination has gripped the public attention: bias-motivated violence.[1] It would be naive to say that this problem is a recent one. *See* H. Shapiro, *White Violence and Black Response* (1988) (examining the history of racial violence from Reconstruction through the Civil Rights Movement of the 1960's); M. & J. Newton, *Racial & Religious Violence In America: A Chronology* (1991). Nevertheless, there has been an apparent resurgence of bias-motivated crime in recent years. In the last decade reports of bias-motivated violence have become commonplace. Although no hard statistics on a nation-wide basis are yet available,[2] there is strong

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[1] The New York Governor's Task Force on Bias-Related Violence defined bias-motivated violence as:

> an act or a threatened or attempted act of intimidation, harassment or physical force directed against any person, or group, or their property or advocate, motivated either in whole or in part by hostility to their real or perceived race, ethnic background, national origin, religious belief, sex, age, disability, or sexual orientation, with the intention of deterring the free exercise or enjoyment of any rights or privileges secured by the Constitution or the laws of the United States or the State of New York whether or not performed under color of law.

V. Lee, *Legislative Responses To Hate-Motivated Violence: The Massachusetts Experience and Beyond*, 25 Harv. C.R.-C.L. L. Rev. 287, 288 n.5 (1990) (quoting Governor's Task Force on Bias-Related Violence, State of New York, Final Report 2 (1988)).

[2] On April 23, 1990, the federal Hate Crime Statistics Act became law. It requires the Justice Department to compile and report annually statistics on the national incidence of hate crimes. Hate Crime Statistics Act, Pub. L. 101-275, 104 Stat. 140 (1990).

evidence to support the widely-held view that bias-motivated violence is on the increase. For example, the United States Commission on Civil Rights has reported the increase in anti-Semitic incidents documented by the Anti-Defamation League ("ADL") of B'nai B'rith. U.S. Commission on Civil Rights, *Intimidation and Violence, Racial and Religious Bigotry in America* 4 (Clearinghouse Publication No. 96, 1990) (hereinafter "Intimidation and Violence").[3] Introducing a survey of bias-motivated violence from 1980-1986, the Center for Democratic Renewal noted:

> Not a day has passed in the last seven years without someone in the United States being victimized by hate violence. Harassment, vandalism, arson, assault and murder motivated by racism, anti-Semitism or other forms of bigotry – such as homophobia – plague every section of our country. This violence is a largely unrecognized cancer eating away our communities and social institutions.

C. Lutz, *They Don't All Wear Sheets, A Chronology of Racist and Far Right Violence – 1980-1986* 11 (1987).

This chilling reality has been reflected in studies at the state level as well.

> Like other states, Minnesota is experiencing increasing incidents of bias-motivated harassment and violence. Law enforcement statistics

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[3] ADL records reported by the U.S. Commission showed an increase in anti-Semitic vandalism from 377 episodes in 1980 to 715 in 1984 and 838 in 1988. Anti-Semitic "harassments, threats, and assaults" increased from 112 in 1980 to 458 in 1988. *Intimidation and Violence* 4.

> and information collected by the Governor's Task Force on Prejudice and Violence document substantial levels of criminal behavior motivated by racial, sexual, religious and homophobic prejudice. Reports from college campuses across the state, from rural areas and small cities and from large metropolitan jurisdictions indicate that prejudice is widespread and has no geographic boundaries. Although victimized groups vary in relation to their representation in the local population, they universally experience a level of terror and frustration that it unique to victims who are randomly attacked for their values, beliefs and individual or group identities.

V. Lane, *Bias Motivated Crimes, A Summary Report of Minnesota's Response* 20 (1990). *See also Intimidation and Violence* 5-7.

Indeed, whether or not incidents of bias-motivated violence are on the increase, they are unarguably a significant problem. The U.S. Commission on Civil Rights concluded that "the phenomenon of racial and religious violence and harassment is a continuing threat to the maintenance of a peaceful, democratic and pluralistic society." *Intimidation and Violence* at 26. The states have a compelling interest in eliminating this particular threat posed by bias-motivated violence and harassment.

In the face of this virulent national epidemic, petitioner and at least one of their supporting amici posit an improperly narrow construct of the state interest at issue here. Petitioner urges:

> The references of the Minnesota Supreme Court to "protecting the community" against "bias-

> motivated threats," reflect the general governmental concern in maintaining public safety and order. . . . [G]eneral penal laws are available to punish any conduct and expression that is properly subject to regulation.

Petitioner's Br. at 12. The same argument is made by amicus curiae Patriot's Defense Foundation, Inc.:

> [T]here is absolutely no reason why a person who commits a crime for political or ideological reasons should receive a more severe criminal sanction for that reason than a person who commits a similar act on account of covetousness, greed, a desire for revenge, generalized malevolence or for some other base reason. . . . To the extent that racial and religious violence is a serious concern in our society, there is every reason to believe that our existing criminal laws and civil sanctions are more than adequate to deal with the problem.

Brief of Amicus Curiae Patriot's Defense Foundation, Inc. at 6-7.

The amici states vigorously disagree with this position. The burning of a cross on the property of an African-American family is most emphatically not the equivalent of a simple trespass and minor arson, either to the specific victims of the crime or to the community in which it occurs. Nor is the painting of a swastika on the wall of a synagogue the same kind of vandalism as painting meaningless graffiti on the wall.

From the point of view of the victim, bias-motivated crime can have devastating effects that differentiate it from similar conduct not motivated by prejudice. The victims of bias-motivated violence are harmed not just by

the damage to person or property that may result, but by the injury that results from its motivation. Plainly, such crime conveys to the victim that he or she is different, inferior, unwelcome and unwanted. Because bias-motivated crime indicates that the victim was an intentional, not random target, it also conveys the threat that more violence may be in store. *See* M. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2336-38 (1989).

In addition, bias-motivated crime has potential impacts on the community that differ from those resulting from similar acts committed "on account of covetousness, greed, a desire for revenge, generalized malevolence or for some other base reason." As reported to Congress by the American Psychological Association:

> Bias-motivated crimes have long-lasting effects on the individual and the community of which they are a part. Such crimes are directed not only at the individual victim but to their communities as well.
>
> . . . .
>
> Research that has been conducted on the impact of crime and violence on the larger community tends to report that there is an increase in community tensions, a higher propensity for continued violence and that groups which are the focus of violence become distrustful, hostile, and withdrawn from the larger community. The effect of racial, ethnic, religious, and homophobic violence is one of limiting community participation and decreasing personal interaction.

Hate Crime Statistics Act of 1988: Hearing on S. 702, S. 797, and S. 2000 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 100th Cong., 2d Sess. 240-41 (June 21, 1988) (testimony of the American Psychological Association). The American Bar Association Section on Criminal Justice recently reported:

> [M]any criminal justice personnel and community leaders believe that crimes motivated by bias have a far more pervasive impact than comparable crimes that do not involve prejudice because they are intended to intimidate an entire group. The fear they generate can therefore victimize a whole class of people. Furthermore, our country is founded on principles of equality, freedom of association, and individual liberty; as such, bias crime tears at the very fabric of society.

P. Finn, *Bias Crime: Difficult to Define, Difficult to Prosecute*, 3 Crim. Just. 19, 20 (1988).

These amplified harmful effects and consequences of bias-motivated violence provide states with compelling reasons to take measures specifically directed at such conduct.

Nevertheless, the increased harm of bias-motivated violence is not the only reason that it should be addressed as more than just common crime. There is a significant symbolic message involved. By directly and expressly attacking bias-motivated violence, society tells those who would engage in bias-motivated violence that their conduct is unacceptable and specifically contrary to public policy. There is significant value in transmitting

that message. The U.S. Civil Rights Commission concluded:

> Some national, State, and local leaders have not been as vocal as they should be in expressing outrage over criminal acts that deny constitutional rights to persons because of their color, creed, religion, or national origin. Whether this is due to unintentional insensitivity, or to a deliberate conspiracy of silence, it too becomes the ground for believing that illegal acts of racial or religious violence will not be challenged seriously.

Intimidation and Violence at 27. By treating bias-motivated crime as something different from other criminal conduct, states send the message urged by the Civil Rights Commission to both the victims and the perpetrators of such violence.

States should not be prohibited from doing so by mistaken claims of first amendment freedom. As demonstrated below, there is plainly a core of bias-motivated conduct that is deserving of no first amendment protection.

II. THERE IS A RANGE OF BIAS-MOTIVATED ACTIVITY THAT MAY BE PROHIBITED WITHOUT INFRINGING FIRST AMENDMENT RIGHTS.

Amici states hold the freedom of speech guaranteed by the first amendment in no less regard than they do their commitment to the goal of freedom from bias-motivated violence. While those goals may at some points on the spectrum be in tension, amici believe there is a clearly

identifiable range of conduct and speech that can permissibly be regulated without offending first amendment rights.

It is axiomatic that the first amendment freedom of speech is not absolute. Pure speech is afforded the strongest protection, but there are even forms of pure speech that are beyond the protective shield of the first amendment. *E.g., Watts v. United States*, 394 U.S. 705 (1969) (true threats). Speech mixed with conduct is entitled to some first amendment protection, but of a lesser degree. *E.g., United States v. O'Brien*, 391 U.S. 367 (1968). Finally, the state plainly can prohibit conduct that has no expressive content. Such conduct does not come under the protective umbrella of the first amendment merely because the conduct is motivated by particular beliefs, political, social or otherwise.

In their efforts to combat bias-motivated violence, states have adopted a variety of measures and approaches that address these various levels of activity.

Some states have criminalized bias-motivated speech when its purpose is to threaten or harass. *E.g.*, R.I. Gen Laws § 11-42-3 (Supp. 1990). Section 11-42-3, in pertinent part, provides:

> Whoever, verbally or by a written or printed communication, maliciously threatens any injury to the person, reputation or property of another, with the intent to terrorize that person by reason of their race, religion or national origin, shall be punished . . . .

Another approach has been to provide enhanced penalties for criminal activity that is motivated by bias. *E.g.*,

Ill. Ann. Stat. § 12-7.1 (Smith-Hurd Supp. 1991); Ohio Rev. Code Ann. § 2927.12 (Anderson 1987).[4] The Ohio law provides:

> (A) No person shall violate section 2903.21 [aggravated menacing], 2903.22 [menacing], 2909.06 [criminal damaging or endangering], or 2909.07 [criminal mischief] or division (A)(3), (4), or (5) of section 2917.21 [telephone harassment] of the Revised Code by reason of race, color, religion, or national origin of another person or group of persons.
>
> (B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation.

Another approach adopted by some states has been enactment of laws that prohibit conduct that interferes, based on race, color, religion, sex, or national origin, with an individual's exercise or enjoyment of rights granted by state or federal law. *E.g.*, Cal. Penal Code §§ 422.6-422.9 (West 1988). Section 422.6 provides:

> (a) No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate or interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States because of the other

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[4] *Cf. United States v. Salyer*, 893 F.2d 113 (6th Cir. 1989) (affirming upward adjustment of sentence based on race of victim and "particular susceptibility" to cross burning).

person's race, color, religion, ancestry, national origin, or sexual orientation.

(b) No person, whether or not acting under color of law, shall knowingly deface, damage, or destroy the real or personal property of any other person for the purpose of intimidating or interfering with the free exercise or enjoyment of any right or privilege secured to the other person by the Constitution or laws of this state or by the Constitution or laws of the United States, because of the other person's race, color, religion, ancestry, national origin, or sexual orientation.

(c) Any person convicted of violating subdivision (a) or (b) shall be punished by imprisonment in the county jail not to exceed six months, or by a fine not to exceed five thousand dollars ($5,000), or by both the fine and imprisonment; provided, however, that no person shall be convicted of violating subdivision (a) based upon speech alone, except upon a showing that the speech itself threatened violence against a specific person or group of persons and that the defendant had the apparent ability to carry out the threat.

These laws are modeled in part on federal civil rights laws. V. Lee, *Legislative Responses To Hate-Motivated Violence: The Massachusetts Experience and Beyond*, 25 Harv. C.R.C.L. L. Rev. 287, 292 (1990).[5]

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[5] *See United States v. Lee*, 935 F.2d 952 (8th Cir. 1991). In *Lee*, the Eighth Circuit upheld against first amendment challenge a conviction under 18 U.S.C. § 241 (1988) for burning a cross on a hill near an apartment building in which an African-American family lived.

Other state laws address property-related aspects of bias-motivated violence by prohibiting vandalism to religious institutions. *E.g.*, Ga. Code Ann. § 16-7-26 (Michie 1988). Yet others are more narrowly directed at acts such as the cross-burning involved in this case. Some of these prohibit cross-burning with specific intent to threaten or harass, *e.g.*, Va. Code Ann. § 18.2-423 (1988); others target cross-burning on public property or the property of another without consent, *e.g.*, Fla. Stat. §§ 876.17-.18 (1989).

These examples of state laws directed at bias-motivated violence are by no means exhaustive.[6] At least forty-three states have enacted one or more of these approaches to combating bias-motivated violence.

In doing so, the states have not lost sight of the first amendment. Recognizing that these approaches cannot be analyzed abstractly in the aggregate, it is nevertheless useful to identify certain principles of first amendment jurisprudence that indicate that these state approaches to bias-motivated violence withstand scrutiny.

First, it must be noted that none of these statutes purport to restrict anyone's beliefs; bigots remain free to believe as they choose. Nor do the statutes interfere with protected free speech. No person is prohibited by these

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[6] Several publications have documented these efforts more completely. *E.g.*, National Institute Against Prejudice and Violence, *Striking Back at Bigotry: Remedies Under Federal and State Law For Violence Motivated By Racial, Religious, And Ethnic Prejudice* (1986); Anti-Defamation League of B'nai B'rith, *Hate Crimes Statutes: A Response to Anti-Semitism, Vandalism and Violent Bigotry* (1988 and Supp. 1990).

laws from addressing a rally, advocating his or her belief in bigotry or hatred, no matter how unpopular or abhorrent to society as a whole.

To the extent that these statutes reach pure speech, they tend to have a narrow grasp. Laws that prohibit speech directed to specific individuals or groups of individuals and require intent to threaten or harass infringe no first amendment rights because the prohibited speech falls into the unprotected category of either threats, *Watts v. United States*, 394 U.S. 705 (1969), or fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

To the extent these laws regulate conduct that has some expressive content, they are subject to the test enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968). Under *O'Brien*, a law will be upheld if:

> [1] it is within the constitutional power of the government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 376-77.

State laws prohibiting bias-motivated violence satisfy each of these elements. First, they are obviously within the constitutional power of the states as exercises of their traditional police powers to protect the health, safety and welfare of their citizens. *E.g., Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2462 (1991). Second, as described in

section I, *supra*, states have a substantial interest in eliminating bias-motivated violence.

Third, this interest is not related to the suppression of free expression. These laws are not directed at the expression of the idea of hatred or bigotry, but at the injury, or threat of injury, to person, property or the exercise of the victim's civil rights that results from the proscribed conduct. *See United States v. Lee*, 935 F.2d 952 (8th Cir. 1991) (upholding conviction under 18 U.S.C. § 241 for cross-burning on this basis). Moreover, since these laws generally require intent to interfere with civil rights or to threaten injury, any expressive element involved in the conduct is so subordinate that the regulation is permissible. *See Colten v. Kentucky*, 407 U.S. 104, 107, 111 (1972).[7] Thus, these laws are, in a sense, a time, place or manner restriction. The expression of bigotry is not prohibited except in the context of speech or conduct that intentionally and directly threatens, intimidates or injures an individual or group of individuals. Only expressed in this "manner" are ideas of bigotry and hatred regulated. Moreover, the specific focus on bias-motivated violence, which may include some aspect of expression, does not necessitate scrutiny as content-based regulation. Like

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[7] *But see Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988). In *Falwell*, the Court held the intent element of a tort claim for intentional infliction of emotional distress insufficient to overcome the first amendment protection for a parody of a public figure. *Id.* at 52-53. However, there is no reason why that ruling concerning "public debate about public figures" should control beyond that limited area.

specific zoning for "adult" theaters, this regulation is aimed not at permissible expression, but at the harmful secondary effects described in section I of this brief. *See City of Renton v. Playtime Theatre, Inc.*, 475 U.S. 41 (1986); *Barnes v. Glen Theatres, Inc.* 111 S. Ct. 2456, 2469 (1991) (Souter, J., concurring).

Finally, the fourth element of the *O'Brien* test is satisfied because the incidental restriction on first amendment activity is no greater than necessary to achieve the governmental interest. While it may be argued that general criminal laws could be used to prohibit the conduct at issue, for the reasons explained in section I, *supra*, reliance on general criminal laws does not fully address the interest at stake.

Thus, amici states believe there is a broad range of bias-motivated violence that can be, and is, properly regulated without interfering with protected first amendment rights. As demonstrated below, the St. Paul ordinance, limited by the Minnesota Supreme Court, is well within this range.

III. AS NARROWLY CONSTRUED BY THE MINNESOTA SUPREME COURT, THE SAINT PAUL ORDINANCE IS VALID.

Petitioner and its supporting amici have devoted much of their arguments to attacking the facial validity of the St. Paul ordinance as written. However, the Minnesota Supreme Court has construed the ordinance narrowly in order to preserve its constitutionality. A state court's interpretation of state law is considered binding by this Court, *see, e.g., Chaplinsky v. New Hampshire*, 315

U.S. 568, 572 (1942), and the Court's analysis of the validity of the ordinance should, therefore, be based on the ordinance as construed, not as written.

Petitioner seeks to challenge the ordinance as overbroad on its face, without reference to the particular conduct for which he was charged. It is well-established that a facial challenge on overbreadth will not be successful unless the overbreadth "is not only 'real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.' " *Osborne v. Ohio*, 110 S. Ct. 1691, 1697 (1990) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Given the limiting interpretation by the state court, the ordinance does not reach a significant amount of protected first amendment speech and is plainly not "substantially" overbroad. It cannot, therefore, be challenged by petitioner based on its application to conduct other than his own.

The state court interpreted the ordinance to apply to two limited categories of bias-motivated expressive conduct. First, the court limited the reach of the ordinance to "expressive conduct that amounts to 'fighting words' – conduct that itself inflicts injury or tends to incite immediate violence . . . . " *In the Matter of the Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). Second, the court held that the ordinance also prohibits "conduct that is 'directed to inciting or producing imminent lawless action and is likely to incite or produce such action.' " *R.A.V.*, 464 N.W.2d at 510 (citing *Brandenberg v. Ohio*, 395 U.S. 444, 447 (1969)). Thus, the ordinance reaches only conduct that is likely to result in immediate breach of the

peace, in the first instance because the target of the conduct will react violently or, in the second, because the actor intentionally incites his supporters to imminent lawless action.

To the extent the ordinance reaches expressive conduct, it has been explicitly limited by the state court to these two types of conduct. This Court has identified both as not receiving first amendment protection. As so interpreted, the ordinance can hardly be said to reach a substantial amount of protected conduct.

Attempting to escape this conclusion, petitioner and his supporting amici argue that the ordinance was not properly susceptible to this narrowing construction. Their arguments should be rejected. This is not a case in which the state courts have applied the challenged law numerous times without limiting its scope. *Compare Gooding v. Wilson*, 405 U.S. 518, 524-27 (1972). Nor is it a case where the law was stated in such all-encompassing terms that no limiting construction could reasonably be discerned. *Compare Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987) ("The resolution expressly applies to all 'First Amendment activities,' and the words of the resolution simply leave no room for a narrowing construction."). Nor is this a case in which a reasonable limiting construction is precluded by other state law. *Compare City of Houston v. Hill*, 482 U.S. 451, 462 n.10 (1987) (fighting words limitation not available because such a construction preempted by state law). Rather, it is a case in which the state supreme court has, in its first opportunity to review the ordinance, narrowed its reach to specific types of expressive conduct this Court has previously identified as not entitled to first amendment

protection. There is no basis on which this Court should ignore the state court's authoritative interpretation of the ordinance.

Amici and petitioner also make strained arguments that attempt to portray the ordinance as affecting a significant range of protected conduct despite the state court's narrowing construction. These efforts are flawed and should be rejected.

It is argued that the court's holding that the ordinance can reach conduct that incites imminent lawless action fatally ignores the context of the *Brandenberg* decision. Br. of Amici Curiae Association of American Publishers and Freedom to Read Foundation ("AAP Br.") at 15-19. The amici argue that *Brandenberg* only applies to speech that *advocates* lawless action and actually incites imminent lawless action by those to whom the advocacy is addressed. They argue that the lower court here construed the law to prohibit speech that incites imminent lawless action among those who are the targets of the speech, even if the speaker did not urge such lawless action. Thus, amici contend, a speaker could be punished because of the unlawful reaction of a hostile audience.

Contrary to amici's distorted version of the decision below, the state court plainly construed the ordinance to apply only to the kind of speech identified as unprotected in *Brandenberg*. The Minnesota court held that the law prohibits "conduct that is *'directed to* inciting or producing imminent lawless action . . . .' " *R.A.V.*, 464 N.W.2d at 510. Using the very words from *Brandenberg*, the court obviously identified precisely the kind of speech urging

lawless action that this Court held is unprotected. The court also wrote that:

> Because the City's disorderly conduct ordinance is reasonably subject to an interpretation limiting its scope to *such conduct as Brandenberg places outside first amendment protection,* we conclude that it is not substantially overbroad.

Id. (footnote omitted). The state court thus made it unequivocally clear that it was referring to precisely the kind of conduct this Court described in *Brandenberg,* nothing more, nothing different. Amici's strained attempt to obfuscate the meaning intended by the state court should be rejected.

The same amici also contend that the court below failed to sufficiently narrow the ordinance to unprotected fighting words. First, they argue that the ordinance as construed reaches more than the fighting words defined in *Chaplinsky,* because the decision does not specify that the immediate breach of the peace that is threatened must come from the addressee of the speech, rather than a bystander. AAP Br. at 20-21. The Minnesota Supreme Court made exceedingly clear its intention to incorporate and graft onto the ordinance this Court's definition of unprotected "fighting words," which includes the gloss amici contend is fatally absent. *Cf. Ward v. Illinois,* 431 U.S. 767, 774-76 (1977) (overbreadth challenge to obscenity statute rejected where state court decision incorporated necessary limitations from *Miller v. California,* 413 U.S. 15 (1973)). In limiting the reach of the St. Paul ordinance to fighting words, the state court should not be required to parrot the entire *Chaplinsky* decision and all the subsequent references to it by this Court.

Amici also argue that the Court below erred by including within its description of fighting words conduct "that itself inflicts injury" as well as that which "tends to incite immediate violence." AAP Br. at 22-23. They argue that the "inflicts injury" aspect of fighting words has been abandoned by this Court, even though it has frequently been included in the Court's references to the doctrine. *E.g., Hustler Magazine v. Falwell,* 485 U.S. 46, 56 (1988); *City of Houston v. Hill,* 482 U.S. 451, 461 (1987); *Lewis v. City of New Orleans,* 415 U.S. 130, 132 (1974). Given this Court's frequent and recent recitation of the same language used by the state court here to describe fighting words, it cannot be argued persuasively that the state court has overstepped constitutional bounds.

The phrase "[words] that by their very utterance inflict injury" does not connote offensive language of the type that merely offends the sensibilities of some, *see Cohen v. California,* 403 U.S. 15 (1971), or that might be labelled as outrageous as applied to a public figure, *see Hustler Magazine v. Falwell,* 485 U.S. 46 (1988). Rather it connotes words that inflict true and substantial injury, such as the kind of racial slurs that, in the particular context, by their utterance strike fear in the victim and convey a threat of violence. Limited, as this branch of fighting words is, to words spoken directly to an individual target and to those words that truly are injurious rather than merely offensive, speech with genuine first amendment value is not threatened.[8]

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[8] Moreover, even if this branch of the fighting words definition were to encompass some range of speech the Court now wishes to exclude from the state's permissible reach, it would not be sufficient to render the ordinance as construed *substantially* overbroad in comparison to the law's permissible applications.

Amicus Center for Individual Rights ("CIR") argues that the state court's narrowing construction fails to save the ordinance because the definition of fighting words is underinclusive. Brief of Center for Individual Rights at 10-12, 18-19. CIR argues that even if fighting words can be prohibited, it is impermissible to single out fighting words that create the risk of violent reaction based on race, color, religion, etc.

The cases of this Court relied on by amicus do not support this proposition. Each of the cases proffered involved a law that restricted some form of *protected* conduct, but did not similarly restrict others. *Cox v. Louisiana*, 379 U.S. 559 (1965) (only union picketing allowed on the streets); *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973) (regulation of campus publications); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (tax exemption limited to religious, professional, trade and sports magazines). As the Court explained in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975), another case cited by amicus, "the Constitution does not permit government to decide which types of otherwise *protected* speech are sufficiently offensive to require protection for the unwilling listener or viewer." (Emphasis added.)

Those cases say nothing about the capacity of the state to specifically proscribe certain types of *unprotected* expressive conduct while leaving others to general prohibitions. Here, as amicus CIR pointed out, the state has a statute that prohibits fighting words generally. CIR Br. at 18, citing Minn. Stat. § 609.72, subd. 1(3) (1990). Because of their singular and distinct harms to victims and the

community, the City of St. Paul chose to separately proscribe bias-motivated fighting words. There is no first amendment principle undermined by that prohibition of unprotected conduct.

Amicus relied as well on Judge Posner's hypothetical example in *Kucharek v. Hanaway*, 902 F.2d 513 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 713 (1991). Judge Posner hypothesized:

> It is easy to imagine a statute that would not exert the state's full power over obscenity yet would violate the First Amendment. A statute forbidding the sale of obscene books unless the book confined its depictions to procreative sex would be one. The state is permitted to suppress obscenity but it is not permitted to distort the marketplace of erotic discourse by suppressing only that obscenity which conveys a disfavored message.

Id. at 517 (*dictum*). The analogy fails here because there is no legitimate "marketplace" of fighting words. As the Court wrote in *Chaplinsky:* "[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.*, 315 U.S. at 572.

Finally, other amici contend that the state court's limiting construction is to no avail because the ordinance remains overboard. Brief Amicus Curiae of the American Civil Liberties Union, Minnesota Civil Liberties Union, and American Jewish Congress at 14-16. They argue that the Minnesota court's invocation of the fighting words

doctrine is insufficient to eliminate the overbreadth, relying on *Lewis v. City of New Orleans*, 415 U.S. 130 (1974). In *Lewis*, on remand for reconsideration in light of *Gooding v. Wilson*, 405 U.S. 518 (1972), the Louisiana Supreme Court ruled that the ordinance at issue was to be limited to "fighting words." However, this Court concluded that despite invoking the "fighting words" doctrine, "[t]he Louisiana Supreme Court on remand did not refine or narrow [the] words [of the ordinance], but took them as they stood . . . . " *Lewis*, 415 U.S. at 132. As Justice Powell explained further:

> In conclusory language, that court construed the ordinance to create a *per se* rule. Whenever "obscene or opprobrious language" is used "toward or with reference to any member of the city police while in the actual performance of his duty," such language constitutes "fighting words" and hence a violation without regard to the facts and circumstances of a particular case. As so construed, the ordinance is facially overbroad.

Id. at 134-35 (Powell, J., concurring).

Amici argue that the Minnesota court created a similarly fatal per se rule by stating that a burning cross is "an unmistakable symbol of violence and hatred." This strained interpretation of the decision below should not form the basis for this Court's opinion. No fair reading of the decision below can lead to amici's conclusion that *every* cross burning is a violation of the ordinance as

construed, regardless of the circumstances of the particular case.[9] Rather, conduct must be judged in accordance with the standards enunciated, and if it is likely to provoke an immediate breach of the peace, it is prohibited. Since the lower court decision did not create a per se rule inconsistent with this Court's definition of fighting words, as the Louisiana court did in *Lewis*, amici's argument fails.

The Minnesota Supreme Court limited the reach of the St. Paul ordinance to two categories of potentially expressive conduct that enjoy no first amendment protection. Because the ordinance as construed does not reach a substantial amount of protected expression, petitioner cannot challenge it based on conduct other than his own. As applied to petitioner's alleged conduct, burning a cross on the property of an African-American family, there can be no doubt that the ordinance suffers no first amendment infirmity. Petitioner's alleged conduct was simply beyond any first amendment protection.

Petitioner also attempts to challenge the ordinance on its face as unconstitutionally vague. However, because the ordinance as construed does not reach protected first amendment expression, it can only be invalidated "if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495

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[9] The phrase relied on by amici certainly creates no per se rule, occurring as it does at the beginning of the decision, and not in the court's discussion of its limiting construction.

(1981). Petitioner's alleged conduct of burning a cross on the property of an African-American family could not reasonably be thought to be beyond the reach of the ordinance. Accordingly, petitioner's vagueness challenge should be summarily rejected.

CONCLUSION

The decision of the Minnesota Supreme Court upholding the St. Paul ordinance as narrowly construed should be affirmed.

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Respectfully submitted,

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